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MICHAEL RODAK, JR.,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 72- 1399

ROBERT J. COAR,

Petitioner,

vs.

HERBERT GROSS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

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Introductory Prayer

The petitioner, Robert J. Coar, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Superior Court of New Jersey, Appellate Division, entered in this proceeding on June 27, 1972. A petition for certification to the Supreme Court of New Jersey was denied on January 18, 1973.

Opinion Below

The opinion of the Superior Court of New Jersey, Appellate Division, unreported, appears in the Appendix hereto. The opinion of the Supreme Court of New Jersey denying certification appears at 62 N. J. 197 and —— A2d ——.

Jurisdiction

The judgment of the Supreme Court of New Jersey was entered on January 18, 1973 and this petition for certiorari was filed within 90 days of that date. The Court's jurisdiction is invoked under 28 U.S.C. 1257 (3).

Questions Presented

1. Whether the cases of *New York Times Co.* v. *Sullivan,* 376 U. S. 254, 84 S. Ct. 710, 11 L. Ed. ad 686 (1964); *Greenbelt Coop. Pub. Asso.* v. *Bresler,* 398 U. S. 6, 90 S. Ct. 1537, 26 L. Ed. 2d 6 (1970); and *Rosenbloom* v. *Metromedia,* 403 U. S. 29, 91 S. Ct. 1811, 29 L. Ed. 2d 296 (1971) have had an effect upon the defense of "fair comment" and "truth" in libel actions?

2. Whether the burden of proof upon a plaintiff, who is a public figure, is a fair preponderance of the evidence or clear and convincing proof in a libel action?

Statutory Provisions Involved

Constitution of the United States
Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof;

or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Statement of the Case

Petitioner, Robert Coar, is the president of Highway and Local Motor Freight Drivers, Dockmen and Helpers Local 701 and is editor of the union paper known as THE LIBERTARIAN. Respondent, Herbert Gross, was a member of the local, who, on several occasions, ran for union office without success.

From approximately 1962 through 1964, respondent published a newspaper known as the VOICE, which was financed by the Communications Workers of America, although this fact was hidden by the plaintiff from the members of Local 701 until it was discovered as a result of an investigation of the company that printed the VOICE.

During the years that the respondent published the VOICE, he accused petitioner, Robert Coar, of being a strike-breaker, selling out the interests of the members of Local 701, failing to properly administer the affairs of the union and of being a paid agent of management. In the June, 1963 issue of the VOICE, respondent, clearly referring to the petitioner, gave a definition of a strike-breaker which included the statement, "After God had finished the rattlesnake, the toad, the vampire, he had some awful substance left, with which he made a 'scab' . . ." A 'strike-breaker' is a traitor to his God, his country, his family, himself and his class. (See Appendix C, 7a for entire article) Respondent specifically testified that this article referred to petitioner, Robert Coar.

In 1963 or 1964, the respondent, as a result of his publication of the VOICE and his picketing on behalf of the CWA against the Teamsters, was charged with duel unionism and union treason. He was found guilty and expelled from the Local.

Based upon the accusations made against petitioner, Robert Coar, and other members of the union by respondent in the VOICE, separate libel actions were instituted in the Superior Court of New Jersey, Law Division, Hudson County, by Robert Coar and other Union officers against Herbert Gross. At the time, an action brought by Herbert Gross against Local 701 for alleged mishandling of union funds by the officers of Local 701 was pending in the Superior Court of New Jersey, Chancery Division, Hudson County. An action brought by respondent, contesting his expulsion from the union, was also pending.

The suit brought by petitioner, Robert Coar, against respondent, Herbert Gross, was the first of the libel suits to be litigated. After the plaintiff had rested his case, the defendant moved for dismissal. When the motion was denied, the proceedings were stopped and a settlement was reached regarding all matters pending between the parties. The settlement was read into the record by the Honorable Samuel Miller as follows:

> Herbert Gross makes the following statement concerning the various suits brought against him by officials and members of Local 701:
>
> "In the years 1962 and 1963, in the course of the election in Local 701, the Voice charged Bob Coar was a strike-breaker; that he sold out the interests of the members; that he failed to properly process grievances and represent the members and that he failed to properly administer the affairs of the Union. These charges were

based upon hearsay information received by us from various members. We have since investigated the information we received. We assure Mr. Coar that at the time that we published these remarks we honestly believed that they were true. We deeply regret any embarrassment Mr. Coar and the officers of Local 701 may have suffered by reason of our publication of these charges which I now find cannot be substantiated."

The suits in this Court and the Courts of the State of New Jersey and in the United States District Court now pending between any member of Local 701, any officer of Local 701 or President of Local 701, individually, or as members of the various locals, will be withdrawn by the respective plaintiffs with prejudice.

Herbert Gross will cease to publish or edit the Voice Publication or any other news publication concerning Local 701. It is mutually agreed between the parties that Herbert Gross will be reinstated as a member of Local 701 immediately. And, he will, thereafter, immediately resign as a member of Local 701, with prejudice.

Local 701 agreed to pay $15,000.00 as determined by the Honorable Robert Matthews, Judge of the Superior Court of New Jersey, to the attorneys for Herbert Gross, as counsel fees and costs in the suit presently pending before him; and, that the aforesaid suit will be marked "settled."

There shall be published in the Libertarian, the Local 701 publication, the terms of this entire settlement with the exception that the financial details of Paragraph 4 will not be disclosed. It is understood, however, that the preamble in Paragraph 1 will be included intact.

There shall be no further or other articles published by any person or persons in any form nor shall there be any discussion at meetings of the Local Union concerning these cases or this settlement. If any such articles or discussions at a meeting do occur and same is traceable to the parties to these suits this shall constitute a contempt of this Court.

The resignation of Herbert Gross, with prejudice, from Local 701, shall not affect his employment rights.

An Order approving the union expenditures was signed by the Honorable Robert A. Matthews with regard to the action pending in the Superior Court of New Jersey, Chancery Division.

Petitioner then directed his attorney to prepare an article to appear in THE LIBERTARIAN. The attorney did so and the article appeared in the June, 1966 LIBERTARIAN. The entire article was as follows:

GROSS ADMITS "VOICE" UNTRUE!

LIBEL TRIALS END IN COMPLETE VICTORY FOR COAR

Jersey City, May 31, 1966. In the past few years, Herbert Gross, a member of Local 701, has published a paper called the "Voice of Truth Teamsters 701". As many members will recall, Gross charged that President Coar and other officers of the Union were failing to process grievances properly, were failing to represent the members, and were failing to administer the affairs of the Union properly. Gross called President Coar a strikebreaker and alleged that he was selling out the interests of the members and favoring employers.

As a result of these charges, a full investigation of the "Voice" was conducted by the Union, and was discovered that the Communication Workers of America was paying for and financing the "Voice". Gross was brought up on charges and found guilty of treason and dual-unionism and expelled from the Union.

Nonetheless, many members were in doubt about the truth of Gross' charges. Many people believe that Gross would not have written up these charges in the "Voice of Truth" unless the charges were true.

President Coar and members of the Executive Board informed the membership that Gross' charge were untrue. But the best place to determine whether these charges were true or not was in a court of law. As a result, President Coar and the members of the Executive Board sued Herbert Gross in the Superior Court of Hudson County and charged that Herbert Gross had lied and libeled the officers of the Union and the Union itself.

The trial of this suit started in Hudson County on May 13, 1966. President Coar produced various witnesses and documentary evidence to prove that Local 701 had negotiated the best contract in the Country and to prove that the members of this Union were being properly represented in the processing of grievances. Documentary evidence was produced to prove to the Court and Jury that Local 701 was the best administered Union in the Country. President Coar produced witnesses to prove that he did not engage in strikebreaking activity.

After two weeks of trial, defendant Herbert Gross demanded that the Court dismiss the case against him. After hearing all of the evidence, Judge Samuel Miller ordered defendant Gross to proceed with his defense.

Not another witness was heard. A recess was called, and after a short while, Herbert Gross admitted that the charges made against Coar were untrue. Gross also apologized to President Coar and the officers of the Union for the embarrassment which he had caused them. It happened in the following way.

Judge Miller called the Jury into the Courtroom and said:

> "Because of the number of lawsuits now pending before the Courts of this State involving essentially the officers of Teamsters Local 701 and Herbert Gross and because of the fact that this litigation has caused and is likely to cause a very large expenditure in legal fees, costs and expenses by both sides, this Court has endeavored to bring the parties together in an effort to amicably settle the differences involved in the various suits. To this end the Court believes that it has succeeded. The parties have been able to settle their differences, and the following is what the parties have agreed to and are agreeing to in Open Court."

Herbert Gross' full retraction and apology was then read to the Jury. Here is what Gross said:

> "In the years 1962 and 1963, in the course of the election in Local 701, the Voice charged Bob Coar was a strike-breaker; that he sold out the

interests of the members; that he failed to properly process grievances and represent the members and that he failed to properly administer the affairs of the Union. These charges were based upon hearsay information received by us from various members. We have since investigated the information we received. We assure Mr. Coar that at the time that we published these remarks we honestly believed that they were true. We deeply regret any embarrassment Mr. Coar and the officers of Local 701 may have suffered by reason of our publication of these charges which I now find cannot be substantiated."

President Coar, immediately after Gross delivered his apology and retraction to him in front of the Judge and Jury, announced that he and the officers of the Union would withdraw all of the libel suits which they had instituted against Gross. President Coar informed the Libertarian:

"I know that the members of our Union will be pleased to learn that I have been completely vindicated. I bear no malice toward Herbert Gross. He finally saw the error of his ways, admitted the charges against me could not be substantiated, and apologized. Now the members of the Union can have no doubt of the truth established in open Court in the presence of a Judge and Jury."

Gross Quits Local 701

Another startling development in the case was that Herbert Gross, after having been reinstated to membership in Local 701, resigned as a member of

Local 701 with prejudice. This means that Gross can never again be a member of Local 701. Gross also agreed to withdraw the Title I suit against Local 701 in which he charged that the Union improperly expelled him for treason.

The "Voice of Truth" Ends Publication

After having admitted that his charges against Coar and the officers could not be substantiated, Gross agreed in open Court, never to publish the "Voice of Truth" again. He also agreed never to edit or publish any other news publication concerning Local 701. In order to enforce the provisions of the settlement, the Court stated:

> "There shall be no further or other articles published by any person or persons in any form nor shall there be any discussions at meetings of the Local Union concerning these cases or this settlement. If any such articles or discussions at a meeting do occur and same is traceable to the parties to this suit, this shall constitute contempt of this Court."

President Coar advised the Libertarian:

> "I know that the members of Local 701 will be pleased to finally know the truth. We shall always be vigilant against attempts of other Unions to infiltrate Local 701. We shall always insist that the truth be told to the members of Local 701. Now the members of the Union can rest knowing that their Union is run properly and that the officers of this Union have been fulfilling their duties faithfully and properly."

Court Upholds Local 701 Expenditures

In another important development, Herbert Gross agreed to withdraw all charges against Local 701 pending in the Courts relating to the Union's financial expenditures. Many members will recall that Gross charged President Coar and the officers with using monies of the Union for their own personal gain.

However, Judge Robert Matthews, Chancery Division, Hudson County Superior Court, announced that he would approve all of the financial expenditures made by the Union. Judge Matthews announced that the Union resolutions and constitutional provisions did not violate any provision of State or Federal law and that President Coar and the other officers of the Union acted properly in making the expenditures.

This fulfills a prediction made by President Coar over a year ago when he informed the membership that Local 701 would take this case to Court to prove to the members that it had acted properly. Once again, President Coar and the other officers of the Union received a full and complete bill of health from Judge Matthews of the Chancery Division in Hudson County. President Coar stated:

> "I am extremely pleased that the members of this Union are no longer tainted with charges of improper financial expenditures. The reputation of this Union itself was at stake, and now we have proved beyond doubt that we acted properly in everything we did and that the charges made against us were unfounded."

Message From the President

The long battle with Herbert Gross' "Voice," Financed by the Communication Workers of America is over. All of the suits filed by Herbert Gross against Local 701 have been withdrawn. All of the charges made by Herbert Gross against the officers of the Union have been withdrawn. Herbert Gross has apologized to the officers of the Union for his unfounded charges, and Judge Matthews has approved all of the challenged Union financial expenditures. Herbert Gross has resigned as a member of Local 701 and the so-called "Voice of Truth" will never be published again.

One sad fact remains. None of this would have happened if the truth had been told from the very start. The officers of this Union are not afraid to face the truth. In fact, we are very proud to live in a Country which has a Court system like ours, so that we could prove that Gross' charges were unsubstantiated.

On behalf of the officers of the Union and myself, I want to thank the members of this Union for remaining impartial until the final verdict was in.

The battle for better wages, and working conditions and the struggle for decent unionism does not end here. It has just begun. In future days there will probably be other members who will use the tactic of the big lie and half-truth to destroy our Union. We do not want the members to forget the "Voice of Truth". We want the members to remember the "Voice of Truth" and the unfounded, unsubstantiated charges which were spread about

our Union. We always believed that the members of this Union would finally know the truth, and we fought hard to prove the truth because the reputation of our Union was at stake. Now all of us should take fresh stock and look toward the advancement and betterment of this Union and its members. But in the process we should never forget this example of what happens when the truth is finally told.

C.W.A. Must Answer to Coar

Now that Herbert Gross has admitted that all of his charges against Coar were unsubstantiated and apologized to President Coar, Local 701 can concentrate its energies in the prosecution of the libel suit against the Communication Workers of America.

Many members will recall that it was the CWA who financed the "Voice" publications and gave Gross expert editorial advice in spreading all of the unfounded charges against Coar throughout the the Local. Even though Gross has apologized to Coar for the unsubstantiated charges, the CWA still refuses to withdraw the libelous remarks printed about President Coar. As a result, President Coar announced:

> "Local 701 is a small union; but we are not short on courage. Our members cannot and will not permit a vast International Union like the CWA to spread libels about this Union and its officers. We shall continue to fight against the CWA and shall make them admit in open Court that the charges which they spread about the offi-

> **cers of this Local Union are unfounded and untrue. As with Gross, we shall carry this battle in the name of truth on to completion."**

Based on this article, respondent filed suit in the instant matter charging the petitioner with libel and invasion of privacy. Petitioner, in his Answer, gave timely notice of the defenses of truth, fair comment and the First Amendment of the United States Constitution. When both sides had rested their case, the trial judge denied petitoner's motion for dismissal on the ground that there had been no libel or invasion of privacy as a matter of law and instructed the jury that they might base a verdict upon a finding that the plaintiff had proved his case by a fair preponderance of the evidence. The jury returned a verdict in favor of the plaintiff in the amount of $2,000.00 for libel and $1,000.00 for invasion of privacy. The jury did not award punitive damages even though they were instructed that they could do so if they found malice on the part of the defendant.

Petitioner filed a timely appeal to the Superior Court of New Jersey, Appellate Division, which reversed the judgment as to invasion of privacy, but allowed the libel judgment to stand. Petitioner then filed a petition for certification to the Supreme Court of New Jersey. The said petition was denied on January 18, 1973.

REASONS FOR GRANTING THE WRIT

The decision below is not in accord with the applicable decisions of this Court.

A. The Defenses of "fair comment" and "truth" were established as a matter of law.

In 1957, the Supreme Court of New Jersey summarized the law of the defense of fair comment in libel actions as follows:

> "Fact" and "comment" are not always readily distinguishable. The distinction between an allegation of fact and expression of opinion often depends on what is stated in the rest of the article. *Odgers, Libel and Slander, supra,* 166. If the defendant accurately states what some public man has really done, and then asserts that 'such conduct is disgraceful,' this is merely the expression of his opinion, his comment on the plaintiff's conduct. So, if without setting it out, he identifies the conduct on which he comments by a clear reference. In either case, the defendant enables his readers to judge for themselves how far his opinion is well founded; and, therefore, what would otherwise have been an allegation of fact becomes merely a comment. But if he asserts that the plaintiff has been guilty of disgraceful conduct, and does not state what that conduct was, this is an allegation of fact for which there is no defense but privilege or truth. The same considerations apply where a defendant has drawn from certain facts an inference derogatory to the plaintiff. If he states the bare inference without the facts on which it is based, such inference

will be treated as an allegation of fact. But if he sets out the facts correctly, and then gives his inference, stating it as his inference from those facts, such inference will, as a rule, be deemed a comment. But even in this case the writer must be careful to state the inference as an inference, and not to assert it as a new and independent fact; otherwise, his inference will become something more than a comment, and he may be driven to justify it as an allegation of fact.

Apropos of plaintiff's contention that the defense of fair comment was not pleaded "fully and as to every particular," the House of Lords recently held that the question in all cases is whether "there is a sufficient substratum of fact stated or indicated in the words which are the subject-matter of the action, • • •." *Kemsley* v. *Foot,* [1952] *A.C.* 345. There the point made was that "no, or no sufficient, statement of the facts on which the comment is made appears in the [newspaper] article complained of;" and Lord Porter said that the facts necessary to justify comment might be implied from the terms of the impugned article, and the relevant questions were whether (a) the subject matter was indicated with sufficient clarity to justify comment being made, and (b) the comment actually made was such as an honest, though prejudiced, man might make. *Leers* v. *Green,* 24 N. J. 239, 251-252 (1957).

And, Dean Prosser has stated:

"(I)t is now generally agreed that it is not necessary to prove the literal truth of the accusation in every detail, and that it is sufficient to show that

> **the imputation is substantially true, or, as it is often put, to justify the 'gist' or the 'sting' or the 'substantial truth' of the defamation." Prosser, William L., *The Law of Torts,* 3rd Ed. (1964).**

A comparison of the transcript of the settlement proceedings in the previous litigation and the article that forms the basis for the within action indicates clearly that the June, 1966 article in the LIBERTARIAN was a substantially accurate report of the terms of the settlement together with a fair (although perhaps biased) comment thereon, as a matter of law.

Respondent initially takes exception to the headline "Gross Admits VOICE Untrue." But the settlement read in open Court stated in part, as quoted in the article, that Mr. Gross could not substantiate his charges.

Plaintiff next contends that the sub-headline "Libel Trials End in Complete Victory for Coar" was untrue and libelled him. In fact, Gross stated in depositions that he considered the settlement a complete victory for Coar although he did admittedly later hedge and say he considered it a complete victory for him. Defendant, Robert Coar, testified why he considered the settlement a complete victory and, thus, when the article was published this was truly his belief, and plaintiff himself testified on depositions that others also considered the settlement a defeat for Gross.

The first paragraph of the article then states the factual situation concerning the background for the libel suit that was being heard before Judge Miller and the plaintiff admitted in his testimony to each of the facts as set forth in that paragraph.

The second paragraph also contains factual material that plaintiff admitted to specifically concerning his expul-

sion from Local 701 on charges of dual unionism and treason as well as the fact that the CWA financed the publication and printing of the VOICE.

The third paragraph consists of opinion that was never questioned and which certainly is a fair and truthful statement.

The content of paragraph 4 is a matter of record, indicating that a suit was actually instituted by Robert Coar against Herbert Gross.

The fifth paragraph states that the trial before Judge Miller began and relates as to the testimony that Robert Coar produced pursuant to his case.

Thereafter, paragraph 6 states the fact that the Court denied Gross' motion to dismiss plaintiff's case and ordered Gross to present the defense. Although plaintiff may have testified as to his opinion as to what the significance of the denial of the Court's motion and the ordering of the defendant to proceed meant, this Court certainly can take judicial notice as to whether the contents of this paragraph are a true and accurate report of what occurred.

Thereafter, paragraph 8 explains what took place mechanically in regard to the settlement and directly quotes from the transcript of the proceedings before Judge Miller.

On page 2 of the June, 1966 LIBERTARIAN in paragraph 1, the article then recites the additional terms of the settlement that Coar and the Union officers would withdraw all of the libel suits that had been instituted by them against Gross. This was also part of the settlement, as testified to by several witnesses. There then follows a statement made by Robert Coar indicating his opinion as to the effect of the settlement.

The paragraph entitled "Gross Quits Local 701, related additional terms of the settlement as spelled out by Judge Miller in the transcript.

The next section of the article entitled "The 'Voice of Truth' Ends Publication" further states and, in fact, quotes Judge Miller as to how the terms of the settlement are to be enforced.

While plaintiff takes exception to the section entitled "Court Upholds Local 701 Expenditures", there was clear proof presented through the testimony of plaintiff's witness and former attorney, John Craner, that prior to Judge Miller's readings, the settlement terms in open Court, Judge Miller, plaintiff's attorney, John Craner, and defendant's attorney, David Friedland, met with Judge Mathews, before whom the suit regarding the alleged misappropriation of Union funds was pending, and the parties agreed to dispose of that suit. In evidence in the Order and Consent Judgment executed by Judge Mathews approving the Union expenditures that has been questioned, which approval was certainly contemplated by all of the parties as one of the elements of the total settlement (See Appendix D, 9a).

While plaintiff may question the terms used in the article, it seems clear that the article reports in layman's terms what occurred pursuant to the settlement and is essentially a true and factual report as a matter of law.

In *New York Times Co.* v. *Sullivan,* 276 U. S. 254, 11 L. Ed. 2d 686, 84 S. Ct. 710 (1964), Mr. Justice Brennan stated:

> "As Madison said, 'Some degree of abuse is inseparable from the proper use of everything; and in no instance is this more true than in that of the press.' 4 Elliot's Debates on the Federal Constitution (1876) p. 571.

In *Cantwell* v. *Connecticut,* 310 U. S. 296, 310, 84 L. Ed. 1213, 1221, 60 S. Ct. 900, 128 A. L. R. 1352, the Court declared:

> 'In the realm of religious faith, and in that of political beliefs, sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to villification of men, who have been, or are prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy . . .'"

Erroneous statement is inevitable in free debate, and must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive,' *N.A.A.C.P.* v. *Button,* 371 U. S. 415, 433, 9 L. Ed. 2d 405, 418, 83 S. Ct. 328.

In *Greenbelt Coop. Pub. Asso.* v. *Bresler,* 398 U. S. 6, 26 L. Ed. 2d 6, 90 S. Ct. 1537 (1970), the plaintiff, a real estate developer, brought a libel action against a local paper for an allegedly libelous article calling him a "blackmailer." This honorable Court, finding that "(E)ven the most careless reader must have perceived that the word was no more than rhetorical hyperbole, a vigorous epithet used by those who consider Bresler's negotiating position unreasonable, reversed a libel judgment in favor of the plaintiff as a matter of law. It is submitted that, at their worst, the facts of the present case may reveal rhetorical

hyperbole of the same nature. And, as held in *Greenbelt,* this type of statement must be protected under the First Amendment as set forth in the cases cited above. This is especially true when one considers the added factor that the LIBERTARIAN and the VOICE were directed to a closed group of men, all of whom were well aware of the biases of the editors and publishers of each paper.

It is therefore respectfully submitted that a judgment in favor of the defendant should have been ordered as a matter of law.

B. The Burden of proof in this case should have been clear and convincing evidence.

The instant matter was tried prior to this Court's decision in *Rosenbloom* v. *Metromedia,* 403 U. S. 29, 29 L. Ed. 2d 296, 91 S. Ct. 1811 (1971) and the trial Court permitted the jury to reach its verdict on a finding that the plaintiff had proved his case to a fair preponderance of the evidence. In *Rosenbloom,* however, this Court stated:

> "Moreover, we ordinarily decide civil litigation by the preponderance of the evidence. Indeed, the judge instructed the jury to decide the present case by that standard. In the normal civil suit where this standard is employed, we view it as no more serious in general for there to be an erroneous verdict in the defendant's favor than for there to be an erroneous verdict in the plaintiff's favor. *In re Winship,* 397 U. S. 358, 371, 25 L. Ed. 2d 368, 379, 90 S. Ct. 1068 (1970) (Harlan, J., concurring). In libel cases, however, we view an erroneous verdict for the plaintiff as most serious. Not only does it mulct the defendant for an innocent misstatement but the possibility of such error, even

beyond the vagueness of the negligence standard itself, would create a strong impetus toward self-censorship, which the First Amendment cannot tolerate." *Rosenbloom* v. *Metromedia,* 403 U. S. 29, 49, 29 L. Ed. 2d 296, 315-316, 91 S. Ct. 1811 (1971).

The question of the burden of proof was not raised in the case by the Superior Court of New Jersey, Appellate Division. It was, however, brought to the attention of the Supreme Court of the State of New Jersey in the Petition for Certification. It is submitted that since this case involves the First Amendment of the United States Constitution, it is of such great importance that the rule of *Rosenbloom* v. *Metromedia, supra* should apply to cases where appeals were pending at the time of this Court's decision in *Rosenbloom* and that the burden of proof as to all elements of the Complaint would be by clear and convincing proof.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Superior Court of New Jersey, Appellate Division and the Supreme Court of New Jersey.

Respectfully submitted,

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APPENDIX A

Per Curiam Opinion of the Superior Court of New Jersey, Appellate Division

(Filed—June 22, 1972.)

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

HERBERT GROSS,

Plaintiff-Respondent,

v.

ROBERT J. COAR and HIGHWAY AND LOCAL MOTOR FREIGHT DRIVERS, DOCKMEN AND HELPERS LOCAL UNION 701,

Defendants-Appellants.

Argued June 12, 1972—Decided June 27, 1972.

Before Judges SULLIVAN, LEONARD and CARTON.

On appeal from Superior Court, Law Division, Middlesex County.

Mr. Melvin S. Whitken argued the cause for appellants (*Messrs. Asch, Asch & Whitken,* attorneys).

Mr. John P. Breen argued the cause for respondent.

PER CURIAM

In these consolidated matters, the jury in answer to special interrogatories unanimously found, in the first case,

that the June 1966 issue of the "Libertarian" libeled plaintiff and in the second case, that although the February 1968 issue of that magazine did not libel plaintiff, its publication was an invasion of his right of privacy. Accordingly, in the first case, it awarded plaintiff $2000 compensatory damages against defendant Coar and in the second it awarded $1000 compensatory damages against defendants Coar and Local 701. In both, the jury specifically declined to allow punitive damages.

Defendants appeal from the judgments entered pursuant to the above verdicts and from the court's denial of their motion for a new trial or judgment n.o.v.

Defendant Coar first contends that the libel verdict against him is against the weight of the evidence. He urges that the June 1966 "Libertarian" article was a fair, accurate and truthful report of the terms of the settlement reached between plaintiff and officials of Local 701 in legal actions then pending, as it was read by Judge Samuel Miller in open court on May 31, 1966. He argues that, as such, the publication was privileged. This contention and the arguments urged in support thereof are without merit. The magazine article differed substantially from the terms of the settlement as read by the judge. The headline "Gross admits 'Voice' untrue!" was not in accord with the settlement statement which noted that at the time they were published Gross "honestly believed that they were true" but that they presently "cannot be substantiated." Nor was the subheadline "Libel Trials end in complete victory for Coar" truthful. To the contrary, Gross' counsel was paid $15,000 by Local 701 of which Gross received some $9000. In sum, there was ample credible evidence in the record to support the jury's determination that the June 1966 article was untrue and libelous.

Appendix A

Defendants next contend that the trial court erred in allowing prejudicial statements as to the alleged assaults and batteries against union members. The record discloses that the court sustained practically every objection raised by defense counsel to these questions or answers and in most instances directed that such testimony be stricken and the jury was instructed to disregard it. Defendants were not prejudiced by the remaining isolated references to physical activity by or between union members. This point lacks substance.

We find no mistaken exercise of discretion on the part of the trial court in refusing to include with the special interrogatories submitted to the jury, the two additional interrogatories requested by defendant. The legal principles included therein were thoroughly covered in the main charge of the court.

Defendant's assertion that the trial court erred in advising the jury as to what evidence should be given particular weight is frivolous. The trial court was merely pointing out that which was a fact, that the case centered upon the original settlement agreement read by Judge Miller and the subsequent two "Libertarian" publications.

The trial court did not err in refusing to grant defendant Coar's motion for a new trial or for judgment n.o.v. as to the libel judgment. The fact that the jury awarded plaintiff $2000 compensatory damages and did not award him punitive damages does not mandate a determination that the verdict was inconsistent. Even though malice was found to be present, the jury, within its province could have decided that defendant should not be "punished" beyond the award for compensatory damages. *Cf. Berg* v. *Reaction Motors Div.*, 37 N. J. 396, 412-13 (1962).

For all of the above reasons, we conclude that the judgment of $2000 in favor of plaintiff and against defendant Coar should be affirmed.

We consider next defendants' argument that the trial court erred in denying their motion for a judgment of dismissal or a judgment n.o.v. as to the $1000 judgment for invasion of plaintiff's right of privacy. Although the right of privacy has been recognized in this State, *McGovern* v. *Van Riper*, 137 N. J. Eq. 24, 32-33 (Ch. 1945), aff'd 137 N. J. Eq. 548 (E. A. 1946), there are limits thereto. See *Palmer, et als.*, v. *Schonhorn Enterprises, Inc.*, 96 N. J. Super. 72, 75-76 (Ch. Div. 1967). A man in public life or a public figure may not claim the same immunity from publicity as may a private citizen. *Ibid.* Plaintiff by reason of his many years of deep involvement with Local 701 and the publishing of the union-oriented "Voice" was, at least within the confines of that union, a "public figure." See *Greenbelt Cooperative Publishing Assn.* v. *Bresler*, 398 U. S. 6, 9 (1970). As such, defendants were not prohibited from making fair comment upon his activities in the "Libertarian," the union magazine. The mere fact that the plaintiff had not engaged in union activity within the recent years would not prevent fair comment upon his previous activity. *Cf. Estill* v. *Hearst Publishing Co. Inc.*, 186 F. 2d 1017, 1022 (7 Cir. 1951); *Sidis* v. *F-R Pub. Corp.*, 113 F. 2d 806, 809 (2 Cir. 1940), *cert.* den. 311 U. S. 711 (1940).

Since the jury determined that plaintiff was not libeled by the June 1968 publication, and that determination is not here challenged, we conclude that the trial court erred in refusing to enter a judgment n.o.v. as to this portion

of the judgment. Accordingly, the $1000 judgment in favor of plaintiff and against defendants Coar and Local 701 is reversed.

The $2000 judgment is affirmed; the $1000 judgment is reversed; both in accordance herewith. No costs.

APPENDIX B

Order of the Supreme Court of New Jersey Denying Certification

(Filed—January 18, 1973)

SUPREME COURT OF NEW JERSEY

C-199 SEPTEMBER TERM 1972

HERBERT GROSS,

Defendant-Petitioner,

vs.

ROBERT J. COAR, *et als.*,

Plaintiffs-Respondents.

To Appellate Division, Superior:

A petition for certification having been submitted to this Court, and the Court having considered the same,

It is hereupon Ordered that the petition for certification is denied, with costs.

Witness, the Honorable Joseph Weintraub, Chief Justice, at Trenton on the 18th day of January, 1973.

FLORENCE R. PESKOE
Acting Clerk

APPENDIX C

Voice Article of June, 1963

(EXHIBIT DF-6)

STRIKEBREAKING

After the last issue of "Voice", and after the last issue of the paper of the officers of Local 701, paid for by the money of the rank and file, there seemed to be a lot of doubt in people's minds as to just what a "strikebreaker" really was. So, we reprint this definition from another Union newspaper:

"THE STRIKEBREAKER"

> A prominent clergyman once gave the following statement as his version of "cabs" or "strikebreakers" after having been compelled to associate with them for a short time:
>
> "After God had finished the rattlesnake, the toad, the vampire, He had some awful substance left, with which He made a 'scab'. A scab is a two-legged animal with a cork-screw soul; a water-logged brain, a combination backbone made of jelly and glue. Where others have their heart, he carries a tumor of rotten principle. When the scab comes down the street, men turn their backs, and the angels weep tears in heaven, and the devil shuts the gates of hell to keep him out. No MAN has a right to scab as long as there is a pool of water deep enough to drown his body in or a rope long enough to hang his carcass with. Judas Iscariot was a gentlemen compared with a scab, for after betraying his Master, he had enough character to

hang himself, and a scab has not. Esau sold his birthright for a mess of pottage; Judias Iscariot his Saviour for 30 pieces of silver; Benedict Arnold sold his country for a promise of a commission in the English army. The modern strikebreaker sells his birthright, his country, his wife, his children and heir to his God, his family to a trust or corporation. Esau was a traitor to himself; Judas Iscariot was a traitor to his God; Benedict Arnold was a traitor to his country. A 'strikebreaker' is a traitor to his God, his country, his family, himself and his class. A real man is never a 'strikebreaker'."

IF THE SHOE FITS, "Bobby" . . . WEAR IT!

APPENDIX D

Order and Consent Judgment dated May 26, 1966

(Exhibit DF-1)

Docket No. C-177-64

Local Union No. 701, Highway and Local Motor Freight Drivers, Dockmen and Helpers, an unincorporated labor association,

Plaintiff,

vs.

Herbert Gross,

Intervenor,

vs.

Robert J. Coar, Stephen Tamburina, Fred Hess, Frank Iaquinto, Robert Crawley, William Waite and Lawrence Soldano,

Defendants.

Civil Action

This matter having been opened to the Court by John E. Toolan, Esq., Toolan, Haney & Romond, Esqs., attorneys for defendants, and the Court having conducted a full trial of this matter, and the Court having examined

all of the evidence, pleadings, and briefs, and the Court having heard the arguments of counsel for the respective parties, and it appearing to the Court that the Executive Board and membership of Local 701 adopted various resolutions authorizing Local 701 to pay for counsel fees in various law suits instituted for or against officers and shop stewards in their official or individual capacities, and it further appearing to the Court that the Constitution and By-Laws of Local 701 and of the International Brotherhood of Teamsters fully and completely authorize the adoption of such resolutions, and it appearing to the Court that the various resolutions adopted by the membership and the Constitutional provisions authorizing such resolutions do not offend any provision of State law, and it further appearing to the Court that the various resolutions and Constitutional provisions authorizing such resolutions do not offend any provision of the Labor-Management Reporting and Disclosure Act of 1959, and it further appearing to the Court that Local 701 has expended various monies in payment of counsel fees referred to in these proceedings, and it further appearing to the Court that Local 701 may be obligated to expend additional monies in connection with law suits authorized by the various resolutions and Constitutional provisions, and it further appearing to the Court that the matters between the parties have been amicably adjusted, and good cause appearing;

IT IS on this 26 day of May, 1966 ORDERED:

1. That the expenditure of all legal fees by Local 701 in connection with the cases referred to in these proceedings, are authorized and approved;

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2. That the expenditure of any monies by Local 701 pursuant to the resolutions adopted by the membership and Executive Board and Constitutional provisions, are approved;

3. That the resolutions and Constitutional provisions authorizing payment of legal fees are approved;

4. That the expenditure of legal fees in the cases referred to in these proceedings, does not violate any provision of State law and does not violate any provision of the Labor-Management Reporting and Disclosure Act of 1959;

5. That Local 701 may continue to expend legal fees in such cases as are authorized by the Constitutional provisions of the Union and the Union resolutions;

6. That the sum of $15,000.00 is awarded as counsel fees to John A. Craner, Esq.

7. That this matter be marked "settled".

HON. ROBERT A. MATTHEWS
J.S.C.

I hereby consent to the within Judgment.

MILTON, KEANE & DE BONA, ESQS.,
Attorneys for Plaintiff,
By: JOHN MILTON, JR., ESQ.,
A Member of the Firm.

Appendix D

CRANER & BRENNAN, ESQS.,
Attorneys for Intervenor,
By: JOHN A. CRANER, ESQ.,
Attorney, A member of the Firm

TOOLAN, HANEY & ROMOND, ESQS.,
Attorneys for Defendant,
By: JOHN E. TOOLAN, ESQ.,
A Member of the Firm.